

Exhibit 132

September 20, 2022

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

HERMES INTERNATIONAL AND HERMES OF
PARIS, INC.

Plaintiff, :

- against -

MASON ROTHSCHILD,

Defendant. :

-----X

September 20, 2022
11:05 a.m.

** CONFIDENTIAL **

VIDEOTAPED EXAMINATION BEFORE TRIAL of
DR. BRUCE ISAACSON, an Expert Witness on
behalf of the Plaintiffs herein, taken by the
Defendant, pursuant to Court Order, held at
the above-mentioned time via videoconference
by all parties, before Michelle Lemberger, a
Notary Public of the State of New York.

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THE WITNESS: My name is Bruce
Isaacson, last name is spelled
I-S-A-A-C-S-O-N.

THE REPORTER: What is your
current business address?

THE WITNESS: 16501 Ventura
Boulevard, Suite 601, Encino,
E-N-C-I-N-O, California 91436.

B R U C E I S A A C S O N having been first
duly sworn by a Notary Public of the
State of New York, was examined and
testified as follows:

EXAMINATION BY

MR. MILLSAPS:

Q. Good morning, Dr. Isaacson.

A. Good morning.

MR. FERGUSON: Apologies,
Mr. Millsaps. Before we begin, can
we also stipulate that this
transcript will be treated as
confidential as we've been doing in
other proceedings?

MR. MILLSAPS: Sure.

MR. FERGUSON: Thank you.

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2 Q. So in your view, there's no
3 difference here. In other words, someone who
4 names two different entities couldn't think
5 that those are not the same?

6 MR. FERGUSON: Objection.

7 A. Well, I guess what I would say is,
8 number one, I don't know whether they've
9 named two different entities. And number
10 two, they have named confusion as to Hermes
11 and they've named it twice in an articulate,
12 thoughtful manner in response to two
13 different questions.

14 This is someone who is obviously
15 confused. They noticed an Hermes bag, they
16 noticed a bag and they notice that the bag is
17 made by Hermes. And I think they've provided
18 the thoughtful response indicating that
19 they're confused as to the MetaBirkin
20 website. It's very clear to me.

21 Q. You don't know if they're referring
22 to two different entities, but you know that
23 they're confused?

24 A. They can't -- with regard to the
25 confusion that the survey is measuring, there

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2 is no such thing as two different entities.
3 The survey is measuring whether someone is
4 confused with regard to Hermes or Birkin, and
5 so if they are -- and the only way when you
6 think about the cognitive processes that are
7 involved in someone being confused, they have
8 to see the MetaBirkins' home page and they
9 have to make a cognitive connection between
10 that home page and Hermes or Birkin.

11 That's the only way that you can be
12 confused in the survey. There's not a
13 different path by which you can be confused
14 about something else. So that's what they're
15 demonstrating with their responses to
16 question 1 and question 4.

17 Q. Okay. But is this question -- is
18 your survey measuring confusion about the
19 brand Metaverse?

20 A. No.

21 Q. Does this respondent here not appear
22 to differentiate between the brand Metaverse,
23 which they apparently think is a different
24 brand from Hermes?

25 A. I don't know whether they think it's

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2 question 1, they said the company Hermes
3 makes the Meta Burlington bag. They've
4 clearly identified through those two
5 questions that they see a bag that they
6 recognize as coming from Hermes, in the
7 MetaBirkins home page.

8 Whatever else they recognize in the
9 home page is irrelevant to the inquiry that
10 I'm basing my opinions on.

11 Q. So if someone said this is a picture
12 of a Birkin bag, you would consider them to
13 be confused?

14 A. It depends on the questions that
15 they answered that in regard to. If I asked
16 them a question like the questions that my
17 survey is answering -- is asking, and
18 remember what question 1 in the survey asks,
19 question 1 asks, What company, companies,
20 person or people do you think makes or
21 provides the items shown on the web page?
22 And in response to that question, what
23 company or people makes or provides the items
24 on the web page, in response to -- in
25 question 1, respondent ID 101 said, The

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2 company Hermes. That was their answer. It's
3 very clear who they think makes or provides
4 the items shown on the web page.

5 So if someone had answered that in a
6 way that made it clear that they thought that
7 Hermes was shown on the web page or Birkin
8 was shown on the web page, that's the
9 confusion answer.

10 There's -- Dr. Neal, in his rebuttal
11 report, seems to indicate that there are two
12 different kinds of confusion in this case.
13 And there's only one kind of confusion that
14 I'm basing my opinions on. And that's where
15 someone sees the MetaBirkins web page and
16 makes a cognitive connection in their own
17 mind between that web page and Hermes or
18 Birkin. That's what my survey measures.

19 Q. What is the item that's shown on the
20 web page?

21 A. The web page shows a number of
22 items, but most of those items are variants
23 of Hermes bags. There's also some text on
24 the web page, there's a bunch of other things
25 on the web page, but most of what's on that

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2 mean by that term. That's the part I haven't
3 understood, the term NFT in the survey.

4 Q. Do you not use the term NFT in your
5 report?

6 A. I do.

7 Q. And what do you mean by that?

8 A. We can pick a sentence and we can
9 talk about it.

10 Q. No, I just want to know what you
11 mean when you say NFT. Did you -- let me ask
12 a different way.

13 Did you define for your respondents
14 what an NFT was when you asked them the
15 screener questions?

16 A. I specified the kinds of NFTs that
17 they would have had to purchase in order to
18 qualify for the survey. And, yes, I believe
19 that I have added enough specificity in the
20 report to indicate what I mean when I'm
21 talking about NFTs.

22 Q. What kinds of NFTs did you specify
23 for them?

24 A. Well, to take an example, my survey,
25 I'm looking at paragraph 5 in my report,

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2 which uses the word NFTs. And it says, my
3 surveys measure the likelihood of confusion,
4 if any, between the MetaBirkins NFTs sold by
5 Mr. Rothschild and Hermes including the
6 Birkin handbag.

7 And so in that case, you've used the
8 term MetaBirkins NFTs, and I'm really
9 referring there to the NFT products that
10 Mr. Rothschild is selling as MetaBirkins.

11 Q. But the survey responses here
12 reflect what the respondents understood NFT
13 to mean, right, not what you understood it to
14 mean, because you didn't define it for them;
15 am I right about that?

16 A. It depends on the question that
17 you're asking me about. If you're asking
18 about the confusion measures, the confusion
19 measures don't rely on the definition for the
20 word NFT. The qualification questions do use
21 the word NFT and further add some specificity
22 around the kind of NFT that we're talking
23 about.

24 Q. Okay. So let's look at, again,
25 response ID number 101 here, and question 4.

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2 The response, as you see, is the brand
3 Metaverse makes the NFT and the brand Hermes
4 makes the bag. So that answer would reflect
5 what respondent ID number 101 understood an
6 NFT to be, would it not?

7 A. That answer would reflect what
8 respondent 101 thought they should answer or
9 wanted to answer or wanted to provide in
10 response to the question -- to question 4. I
11 don't think they're defining an NFT in that
12 answer.

13 Q. So then the answer to that question
14 reflects whatever the respondent understood
15 the NFT to be, right?

16 A. So the question was asking about
17 other brands or products that they think are
18 made or provided by whoever makes or provides
19 the items shown on the web page.

20 So my hope is that their answer to
21 that question would reflect the other brands
22 or products that they think are made or
23 provided.

24 Q. And in this response to question 4,
25 does the respondent not make an explicit

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2 distinction between NFTs and bags?

3 A. They do have a sentence that has two
4 parts and one part references an NFT and one
5 part references a bag. I don't know if
6 they're making a distinction or not.

7 Q. But you read this and decided that
8 this person was confused, but you don't know
9 what they meant?

10 A. No. I didn't say I don't know what
11 they meant. What I said was, first, I don't
12 need question 4 for respondent 101 to decide
13 that they're confused, because they've
14 already previously identified themselves in
15 response to question 1 as confused. They're
16 already confused.

17 So their response to question 4 is
18 irrelevant. If they had no response to
19 question 4, I would have already identified
20 them as confused in response to question 1.

21 But I am saying that even putting
22 aside the question 1 response, their answer
23 to question 4 indicates that they clearly see
24 a Hermes bag in the MetaBirkins home page and
25 that means they're confused by the way that

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2 likely of confuse surveys work.

3 The fact that they may think that
4 someone else is making the NFT, that's not
5 relevant to anything. They've made a
6 cognitive connection between a bag that
7 they're shown that is never labeled as an
8 Hermes bag in the survey, but they've
9 identified it as an Hermes bag twice.

10 They're thoughtful, they can see
11 what's going on in the survey, and they made
12 a connection between a bag that is not an
13 Hermes bag. It's some variant of an Hermes
14 bag that Mr. Rothschild created, but this
15 person looked at that and said, Wow, that's
16 an Hermes bag. I don't see where there's any
17 question that this respondent is confused.

18 Q. What does question 1 ask? What is
19 question 1?

20 A. Question 1 asks what company,
21 companies, person or people do you think
22 makes or provides the items shown on the web
23 page. There's more to it, but that's the --
24 that's the essence of it.

25 Q. And the response here refers only to

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2 a bag, right?

3 A. I don't think so.

4 Q. Well, doesn't the response here say
5 the company Hermes makes the Meta Burlington
6 bag?

7 A. That's correct.

8 Q. Okay. So -- and then in question 4,
9 doesn't the respondent say the brand
10 Metaverse makes the NFT and the brand Hermes
11 makes the bag?

12 A. Yes, that's correct.

13 Q. So does their answer to question 4
14 not shed some light on whether or not they're
15 confused about the NFT?

16 MR. FERGUSON: Objection to
17 form.

18 A. Once again, putting aside that when
19 you use the word NFT I don't know whether
20 you're using it in the same way that this
21 respondent is using it, but I don't think
22 that question 4 indicates anything, but that
23 the respondent is confused.

24 Q. Okay. Let's say that there's a
25 survey done by Campbell Soup over Andy

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2 hadn't been invented.

3 So it's just, there's a lot
4 different in the context today versus when
5 Mr. Warhol was working with Campbell soup
6 cans.

7 Q. Okay. So taking that hypothetical
8 example of the survey over the Campbell Soup
9 cans, sitting here today, you can't say
10 whether someone who gave a response in such a
11 survey distinguishing between the painting
12 and the soup was making a distinction between
13 two different things?

14 MR. FERGUSON: Objection.

15 A. I think I said it. There's a lot to
16 think about with regard to a survey like
17 that, and I'd have to think about with regard
18 to the design. But I can say that the way
19 that likelihood of confusion surveys work is
20 you're looking for cognitive connections.

21 You're looking for people who see
22 one item and make a connection to another
23 item. So in this case, what my survey
24 measures is whether when someone looks at the
25 MetaBirkins web page and sees a fur-covered

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2 bag, that looks, still has the shape of a
3 Birkin and uses the word Birkin and has
4 Hermes in the disclaimer. Whether that's
5 enough to trigger a cognitive connection,
6 where they believe that what they're looking
7 at comes from Birkin and/or Hermes. And I
8 believe this respondent ID 101 has clearly
9 demonstrated that that is the case for them.

10 Q. Are you saying --

11 A. I don't know what a Campbell Soup
12 survey would look like, but I didn't design a
13 Campbell Soup survey.

14 Q. Okay. Are you saying that the
15 cognitive connection and confusion are the
16 same thing?

17 A. What I'm saying is that from a
18 survey standpoint, what a likelihood of
19 confusion survey measures is whether people
20 make a cognitive connection between an
21 accused item and usually the plaintiff in the
22 case, or between an accused item, let me say,
23 and another item.

24 The survey measures cognitive
25 connections. You're showing one thing and

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2 generally grammatically correct. They're
3 thoughtful answers, they're not short
4 answers, and they reference things that are
5 actually going on in the web page that they
6 were shown.

7 Q. So you considered this respondent to
8 have given a different response in answer to
9 every question?

10 A. The words are different. Some of
11 the themes are similar across questions.
12 They reference Hermes twice, Hermes bags
13 twice. They reference their background
14 knowledge three times. But, yes, they've
15 used different words in response to every
16 answer that they've given across the
17 confusion questions series.

18 Q. And so you looked at all of their
19 answers across this and you made a
20 determination not to exclude them; am I
21 right?

22 A. Not to remove them, that's correct.

23 Q. Okay. Let's go to response ID
24 number 18, please.

25 Could you read the response to

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2 question 2 for me?

3 A. The web page name and description
4 states it's MetaBirkins, but also the web
5 page disclaimer at the bottom clearly states
6 the author of the post or NFT is not
7 affiliated with Hermes who is the actual
8 registered trademark owner of Birkin bags.

9 Q. Okay. And then can you read for me
10 the response to question 4 from this
11 respondent?

12 A. Well, if your question is referring
13 to who makes the actual handbags shown,
14 Hermes sells luxury handbags, footwear,
15 fragrances, accessories, watches and jewelry,
16 to my knowledge.

17 Q. And in your opinion, sitting here
18 today, was this respondent confused?

19 A. Yes.

20 Q. Why is that?

21 A. Because of their responses.

22 Q. Okay. Why do their responses -- how
23 do their responses show that they're
24 confused?

25 A. Well, as we talked about before, the

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2 survey is measuring the cognitive connection
3 between the MetaBirkins home page and Hermes
4 or Birkin. And when we just look at the
5 answer to question 1, that's sufficient to
6 classify them as confused, regardless of
7 their answers to follow-on questions.

8 So in response to question 1, when
9 they're asked what company, companies, person
10 or people do you think makes or provides the
11 items shown on the web page, their answer is,
12 Based on descriptions, disclaimer, it's
13 Hermes, Birkin bags or MetaBirkins.

14 And then we go on and when we look
15 at other questions, we can see in question 2
16 they reference Hermes as being the owner of
17 Birkin bags, and in question 4, they
18 reference all kinds of things that identify
19 that they're clearly thinking of Hermes.
20 They identify in response to question 4,
21 which is asking about other brands or
22 products that are made or provided, they
23 indicate a whole host of other brands -- of
24 other products; handbags, footwear,
25 fragrances, accessories, watches and jewelry.

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2 So they've provided lots of
3 responses, multiple responses to indicate
4 that they're thinking of Hermes, and also to
5 indicate that they are aware of which Hermes
6 it is that we're talking about.

7 Q. So if a respondent thinks of Hermes
8 in looking at the stimulus, you consider that
9 respondent to be confused?

10 A. What we're looking for to consider a
11 respondent to be confused is a cognitive
12 connection between a web page that does not
13 come from Hermes or Birkin and Hermes or
14 Birkin.

15 The whole idea is when people see
16 the web page, do they think that web page is
17 provided by or relates to or comes from or
18 involves Hermes or Birkin. And this person
19 not only is confused by the web page but
20 they're also confused by the disclaimer when
21 I look at the responses, because they're not
22 quite sure what's going on.

23 But they are clearly demonstrating
24 that they looked at this and they thought
25 that somehow Hermes is involved in it. They

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2 think that Hermes is providing the items that
3 are shown on the web page.

4 Q. Doesn't the --

5 A. As an example.

6 Q. -- the response to question 1
7 reflect confusion about what the question
8 itself is asking?

9 A. No.

10 Q. Why not?

11 A. Because if they were confused about
12 what the question was asking, they could have
13 said, I don't know. They could have said, I
14 don't understand the question. They could
15 have checked a box that says, I don't know.

16 And the question itself, question 1,
17 specifically states, if you don't know,
18 please select I don't know. They were asked
19 a question and they provided an answer to the
20 question.

21 And the question is referencing
22 Hermes Birkin -- the answer is referencing
23 Hermes Birkin bags. And they even indicate
24 where they are finding that information.

25 Q. Didn't they answer here referencing

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2 Hermes and also MetaBirkins?

3 A. Yes.

4 Q. Isn't it possible they didn't know
5 if you were asking about the image or what's
6 referenced in the image? So they said both
7 here?

8 A. I don't think that the phrasing of
9 the question is at all ambiguous about what
10 it is asking about. So I think the answer to
11 your question is no. But I can't say for
12 sure how they interpreted the question.

13 Q. And doesn't their response to
14 question 2 demonstrate that they understood
15 exactly what the relationship was?

16 MR. FERGUSON: Objection.

17 A. I think their answer to question 2
18 demonstrates just how confused they are by
19 the page, and demonstrates as well that that
20 disclaimer which is sometimes the case for
21 disclaimers that are not sufficiently clear
22 is exacerbating their confusion.

23 Q. What reflects confusion about a
24 disclaimer in this response to question 2?

25 A. Well, if you go to their response to

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2 question 1, they say right off the bat, Based
3 on descriptions disclaimer, I assume what
4 they are shorthanding there is based on
5 descriptions and the disclaimer. It's Hermes
6 bags -- Hermes Birkin bags or MetaBirkins.

7 So their answer to the first
8 question indicates that they saw something in
9 the disclaimer that made them confused. Not
10 that it made them unconfused, that disclaimed
11 the relationship between the page and Hermes,
12 but rather led them to believe, based on
13 seeing the word Hermes in the disclaimer
14 possibly, that they were confused.

15 And then when I go to question 2, I
16 see that they say the web page name and the
17 description states that it's MetaBirkins, so
18 they understand that, what the name of the
19 description says, and then we get a sentence
20 that starts with but.

21 But also, and now they go on to say
22 that the web page, that the disclaimer
23 clearly states that they're not affiliated
24 with Hermes, who is the actual registered
25 trademark owner of Birkin bags.

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2 So they're, obviously, seeing bags
3 on the web page. They've made the
4 association with Hermes, and that's
5 sufficient to demonstrate that they are
6 confused. And the disclaimer is adding to
7 their confusion about what it is that the web
8 page is communicating.

9 Q. Doesn't the response here to
10 question 2 show that the disclaimer told this
11 respondent about the source of the web page?

12 A. I can't tell. I don't know why in
13 question 2 they started with the word but.
14 And I also don't know why in response to
15 question 1, they seemed to indicate that the
16 disclaimer is increasing their confusion.

17 Q. Isn't their use of "but" also in
18 this response to question 2 giving an
19 additional reason here?

20 A. It could potentially be an
21 additional reason, but I think it's more
22 likely to be given that it's coming in
23 conjunction with other questions, other
24 responses, I think it's more likely to be on
25 the one hand on the other hand. Or in

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2 report?

3 A. No. Well, let me say I don't know
4 of any, but I haven't asked for any other
5 surveys that anyone else might have
6 conducted.

7 Q. Fair enough. I was asking to your
8 knowledge.

9 Going back to your report, am I
10 correct that your first survey was the survey
11 of NFT purchasers?

12 A. No.

13 Q. Your first survey was --

14 A. Let me be more clear in that answer.

15 They were both conducted
16 simultaneously.

17 Q. Okay. And your survey of handbag
18 purchasers showed that MetaBirkins NFTs were
19 not causing any confusion among that
20 universe; am I right?

21 MR. FERGUSON: Objection.

22 A. No, you're not correct.

23 Q. Dr. Isaacson, didn't your handbag
24 purchasers survey find a net confusion level
25 of 3.6 percent?

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2 A. Yes, approximately 3 -- around -- I
3 don't remember the exact number but I'm
4 willing to accept. Well, let me look it up
5 and just confirm the number for you, since
6 we're talking about it.

7 Q. Okay.

8 A. The answer to your question is, yes,
9 that was the net measure from the survey.

10 Q. And in your opinion, is a net
11 confusion level of 3.6 percent evidence of
12 the presence or absence of confusion?

13 A. A net confusion level of 3.6 percent
14 would normally be associated with the absence
15 of confusion, but it's also important to
16 remember that the survey didn't show no
17 confusion. What the survey showed is control
18 cell confusion that was almost equal to the
19 test cell confusion.

20 The control cell confusion was 3.6
21 percent lower than the test cell confusion.
22 So when you look at the results and you want
23 to understand that 3.6 percent, what's
24 happening is that people in the test cell
25 were playing back Hermes or Birkin to -- to a

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2 not insubstantial percentage, 18.8 percent.

3 And even people in that universe who
4 see the control web page were also responding
5 with Hermes or Birkin, in this case to 15.2
6 percent.

7 So this is why I disagreed with your
8 statement earlier that it doesn't show any
9 confusion. It does show confusion. It just
10 shows almost equal confusion on the control
11 cell as on the test cell. That's why the
12 results for the survey are low.

13 Q. Okay. And in your results, is there
14 a reason that you focus on the net confusion
15 level?

16 A. I don't think I focused on either
17 confusion level in my results. I provided
18 the results, but I didn't indicate -- I
19 haven't -- before you asked me just a few
20 minutes ago, I didn't interpret the results
21 in any way in my report.

22 Q. The control specifically is meant to
23 eliminate any features that would be
24 infringing, right?

25 A. It's meant to eliminate any features

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2 that would be objectionable to Hermes in this
3 case.

4 Q. Is it ever appropriate to focus on
5 the gross confusion level rather than the net
6 confusion level to make a conclusion about
7 confusion?

8 A. I'm not sure what you mean by focus.
9 But when looking at a survey and looking at
10 the results of the survey, one considers the
11 test cell confusion, the control cell
12 confusion, and the net confusion. And in
13 this case, both the test cell and the control
14 cell and the net, they're all relevant to, I
15 think, understanding the results of that
16 survey.

17 Q. Have you, in any litigation, offered
18 an opinion that a net confusion level of
19 between 3 and 4 percent supports an inference
20 of confusion?

21 A. No.

22 Q. Does your handbag purchaser survey a
23 forward confusion or reverse confusion
24 survey?

25 A. Neither.

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2 Q. So what is it measuring?

3 A. It's measuring confusion with
4 respect to the MetaBirkin home page among
5 purchasers of very expensive handbags.

6 Q. Do you understand the difference
7 between a forward confusion survey and a
8 reverse confusion survey?

9 A. Yes.

10 Q. So what kind of confusion is there
11 other than forward or reverse confusion?

12 A. There's lots of other kinds of
13 confusion surveys that's not traditionally
14 defined forward confusion or reverse
15 confusion. In this case, there's one survey
16 that I conducted, my NFT survey that's
17 consistent with forward confusion. And
18 there's another survey that I conducted
19 that's looking at a similar kind of
20 confusion, but in this case conducted among
21 the handbag audience.

22 But that second survey, the handbag
23 survey is not measuring forward or reverse
24 confusion, according to the traditional
25 definition. And that's not unusual. The

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2 it's -- that the web page, to my eye, appears
3 to be marketing or selling are a series of
4 handbag images that are sold as a form of NFT
5 products.

6 Q. Okay. And so your understanding is
7 that they're selling images that are
8 depicting handbags?

9 A. They're selling what the page refers
10 to as Meta handbags or -- I'm sorry, that's
11 the control version. The test version refers
12 to what the page is referring to as
13 MetaBirkins. And it specifically says it's a
14 collection of 100 unique NFTs, right at the
15 top of the page. And there's a series of
16 images that reflect these MetaBirkins
17 handbags on the page.

18 So the question is intentionally
19 using the word items, though, to be
20 non-leading to the respondent about what it
21 is that they're looking at. It doesn't refer
22 to these items as NFTs, it doesn't refer to
23 them as artwork, it doesn't refer to them as
24 products.

25 It refers to them as items, which

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2 standard language in a survey like this to
3 not lead the respondent to look at one
4 particular element on the page as opposed to
5 looking at another element on the page.

6 Q. So is it possible that a respondent
7 read the question and thought that you were
8 referring to the Meta -- the NFT images and
9 another respondent could read the question
10 and think that you're referring to the Birkin
11 handbag that the image depicts or references?

12 MR. FERGUSON: Objection to
13 form.

14 You can answer.

15 A. That respondent you just described
16 is confused. You just described the textbook
17 definition of confusion in the likelihood of
18 confusion survey, that second one.

19 If I see that MetaBirkin image and I
20 think it's a Birkin handbag, I'm confused.
21 If I see that MetaBirkin image and I think
22 it's a MetaBirkin made by Mason Rothschild
23 and I don't think of Hermes and I don't think
24 of the real Birkin bag, then I'm not
25 confused. That's exactly what my survey

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2 measures.

3 Q. I'm asking you, is it possible that
4 someone reads the questions here, the
5 language in 1, 4 and 7, where it says, Makes
6 or provides the item shown on the web page,
7 and one person thinks that the item shown on
8 the web page is an NFT image of a handbag,
9 and another person reads that and thinks the
10 item shown on the web page is an actual
11 Birkin handbag.

12 MR. FERGUSON: Objection.

13 A. I have no idea what the question is
14 that you're asking me. I apologize. I know
15 it has something to do with the word item,
16 but I don't understand the hypothetical
17 scenario that you're trying to describe.

18 Q. It's not a hypothetical at all. I'm
19 asking you, you show the test stimulus, which
20 shows the image, right, of the MetaBirkin,
21 and you ask in several of these questions, 1,
22 4, 7, what company, companies, person or
23 people, do you think makes or provides the
24 item shown on the web page.

25 Is it possible that a respondent

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2 looks at that and thinks that you're talking
3 about the handbag that's depicted there, and
4 then says, that's Hermes' Birkin bag. And
5 another respondent looks at that and
6 understands that you mean to refer to the
7 image, of the image that depicts a handbag?

8 MR. FERGUSON: Objection to the
9 form.

10 A. It's occurring to me that the reason
11 I don't understand your question is because
12 your question is attempting to draw a
13 distinction that doesn't exist cognitively
14 for consumers. The question is using the
15 word items to avoid being leading.

16 Had I used the word NFT in your
17 case, in the case that you just described, I
18 would have been pointing people in a
19 particular direction. And had I used the
20 word handbag, I would have been pointing
21 people in a particular direction.

22 But as I talked about earlier, the
23 confusion is confusion, the survey is asking
24 people whether they make a cognitive
25 connection between what -- it's measuring

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2 them, but some of them. That's correct.

3 Q. Are these test cell respondents who
4 were identified as confused?

5 A. Yes.

6 Q. Okay. And if you look at the rows
7 that had been colored in gray here, do these
8 respondents mention plaintiff's goods in
9 response to question 4?

10 A. One of them does.

11 Q. Which one is that?

12 A. Respondent 55.

13 Q. Okay. And do any others?

14 A. No.

15 Q. So aside from 65, based on question
16 4, would you agree that the respondents in
17 gray may have just been playing back the name
18 Hermes or Birkin after reading it on the web
19 page?

20 A. No.

21 Q. What data do you have, aside from
22 question 4, to rule out the possibility that
23 these respondents were merely playing back
24 what they read?

25 A. It's what we just talked about for

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2 the last, I don't know, hour or 90 minutes.
3 We have the verbatim responses and if they
4 were playing back -- for example, let's take
5 respondent 83, they say the company is
6 Birkin, you can see the brand clearly. They
7 don't say the company is MetaBirkins, they
8 say the company is Birkin. That's not a
9 playback. They've written what they see, and
10 they've explained their answer in that
11 answer.

12 Q. How about ID 15, response ID 15 that
13 just says Hermes? How do we know that that's
14 not a playback?

15 A. Well, response ID 15 says Hermes in
16 response to question 1, and again says Hermes
17 in response to question 7. So I don't agree
18 with the approach recommended -- am I allowed
19 to reference Dr. Neal now? If I am, I don't
20 agree with the approach.

21 But the -- even accepting his logic
22 that they have to say it more than once, I
23 think he agrees with me actually on this
24 item, that this is someone who is referencing
25 Hermes more than once in their answers.

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2 Q. Okay. And Dr. Neal performs an
3 analysis where he codes people's answers to
4 question 4 to identify people who mentioned
5 Hermes or Birkin in question 1 or 7 and then
6 also went on to identify plaintiff's goods in
7 question 4. Did you read that section of his
8 report?

9 A. I read his whole report multiple
10 times so, yes.

11 Q. Let's look at that section which is
12 section 3.3.14. It's page 18 of the PDF.

13 And you can see here that based on
14 Dr. Neal's analyses he finds that 9 out of 97
15 test cell respondents were confused and zero
16 out of 104 control cell respondents were
17 confused. Is that an accurate summary of his
18 findings?

19 A. That's his findings, that's correct.
20 At least as he's reporting them in table 4.

21 Q. And given that is it correct that if
22 we accept Dr. Neal's recoding, which I
23 understand you disagree with, but if we were
24 to accept it, the net confusion in your NFT
25 purchaser survey is actually 9.3 percent; is

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2 that right?

3 A. No. Well, it's correct that he
4 wrote 9.3 percent, but even using his
5 standards, he's miscoding some of these
6 respondents even accepting his standards.

7 Q. I understand that you're going to
8 say that he miscoded, but if we accepted Dr.
9 Neal's coding of question 4, then that would
10 show a net confusion of 9.3 percent, right?

11 A. That would be correct. But I just
12 want to be clear in what I'm saying. I'm
13 saying, number one, I disagree with the whole
14 approach and number two, he's made some
15 errors, I believe, on how he implemented the
16 approach.

17 Q. Okay. What errors do you believe
18 that he made in implementing the approach
19 here?

20 A. He miscodes people who match the
21 standards that he, himself, identifies.

22 Q. And who does he miscode here?

23 A. Well, let's take, for example, on
24 the prior page, I don't know that I can
25 identify them all here off the top of my

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2 head, it's late in the day, but respondent ID
3 52, table 3.

4 So this person said Hermes in
5 question 4, and then said Hermes again in
6 question 7. So I think -- if his standard is
7 they have to say it in one and they have to
8 say it in 4, then his coding would stand as
9 he's done it. Again, I disagree with the
10 approach. But if his position is they have
11 to say it more than once, then 52 should be
12 rightfully coded as confused, even by that
13 standard.

14 That's not the only one that matches
15 this kind of a -- this kind of an approach.
16 For example, on the prior page, and this is
17 now page 16 of his report, respondent 108
18 says, Hermes twice, respondent 116 says
19 Birkin twice. Respondent 142 says Birkin
20 twice.

21 And so there's a number of people, I
22 don't want to go through the whole list, but
23 there's a number of people here who he
24 doesn't code in a way consistent with the
25 approach that he's recommending.

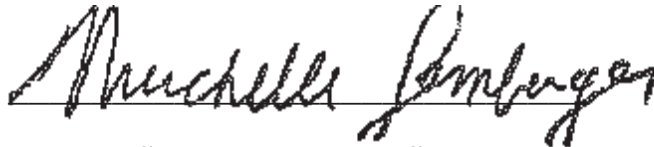
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C E R T I F I C A T E

I, MICHELLE LEMBERGER, a shorthand reporter and Notary Public within and for the State of New York, do hereby certify:

That the witness(es) whose testimony is hereinbefore set forth was duly sworn by me, and the foregoing transcript is a true record of the testimony given by such witness(es).

I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

A handwritten signature in black ink, reading "Michelle Lemberger", written over a horizontal line.

MICHELLE LEMBERGER